Supreme Court, U.S.
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In The
Supreme Court of the United States

Silver Spur Reserve, a California General Partnership, dba Silver Spur Mobile Manor,
Petitioner and Appellant,

v.

The City of Palm Desert and
the Palm Desert Rent Review Board,
Respondents and Appellees.

The Tenants Residing at Silver Spur Mobile Manor
Real Parties in Interest.

On Petition for Writ of Certiorari
to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

IN GALLAND V CITY OF CLOVIS, 24 Cal. 4th 1003, 103 Cal. Rptr. 2d 711, 16 P. 3d 130 (2001), THE CALIFORNIA SUPREME COURT FOUND THAT THE OWNER OF A RENT CONTROLLED PROPERTY WHO HAS BEEN DENIED ITS CONSTITUTIONAL RIGHT TO A FAIR RETURN ON INVESTMENT CANNOT RECOVER ATTORNEY'S FEES FROM A LOCAL GOVERNMENT UNDER 42 U.S.C. SECTION 1988, UNLESS IT CAN ALSO ESTABLISH THAT "GOVERNMENT AGENTS HAVE DELIBERATELY COMMITTED OBSTRUCTIVE AND UNLAWFUL ACTS DESIGNED TO INTERFERE WITH THE [LANDLORD'S] PROPERTY RIGHTS." THIS CASE SEEKS A DETERMINATION AS TO WHETHER THAT STANDARD IS VIOLATED WHERE GOVERNMENT AGENTS DISOBEY COURT ORDERS, REFUSE TO CORRECT OBVIOUS MATHEMATICAL ERRORS, VOTE ON MATTERS WITHOUT REVIEWING THE EVIDENCE, OPENLY EXPRESS HOSTILITY AGAINST LANDLORDS AND, DURING DELIBERATIONS, CONSIDER AMENDING THEIR RENT CONTROL ORDINANCE TO PREVENT LANDLORDS FROM RECEIVING RENT INCREASES IN THE FUTURE?

LIST OF PARTIES

The Petitioner is Plaintiff and Appellant Silver Spur Reserve, a California General Partnership. The Petitioner is represented by Anthony C. Rodriguez of the Law Office of Anthony C. Rodriguez, 1425 Leimert Boulevard, Suite 101, Oakland, California 94602.

The Respondents are the City of Palm Desert and the Palm Desert Rent Review Commission, represented by Douglas S. Phillips of Best, Best & Krieger, 74-760 Highway 111, Suite 200, Indian Wells, California 92210.

The Real Parties in Interest are "the Tenants residing at Silver Spur Mobile Manor," represented by Michael Zitomer, Esq., 225 S. Civic Drive, Suite 2-14, Palm Springs, California 92262.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

LEGAL ARGUMENT 18

A. SILVER SPUR IS ENTITLED TO ITS ATTORNEY'S FEES UNDER 42 U.S.C. SECTION 1988 19

B. THE PETITION FOR A WRIT OF CERTIORARI MAY BE GRANTED UNDER SUPREME COURT RULE 10 27

CONCLUSION 30

TABLE OF AUTHORITIES

Cases:

Appelbaum v. Board of Directors, (1980) 104 Cal. App. 3d 648 25

Aware Woman Clinic v. City of Cocoa Beach, 629 F. 2d 1146 (5th Cir. 1980) 19

Bly v. McLeod, 605 F. 2d 134 (4th Cir. 1979) 19

Bohn v. Watson, 130 Cal. App. 2d 24 (1954) 23

Galland v. City of Clovis, 24 Cal 4th 100 (2001) 15, 18, 27

In Re: Charboneau, 42 Cal. App. 3d 505 (1974) 23

Maine v. Thiboutot, 448 U. S. 1; 100 S. Ct. 2502; 65 L. Ed. 2d 555 (1980) 19

New York Gaslight Club v. Carey, 447 U. S. 54; 100 S. Ct. 2024; 64 L. Ed. 2d 723 (1980) 19

Topanga Assn. for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506 (1974) 26

Codes and Statutes:

42 U.S.C. Section 1983. 19

42 U.S.C. Section 1988 ..... 2, 16, 19, 20

PETITION FOR A WRIT OF CERTIORARI TO REVIEW AN ORDER OF THE CALIFORNIA SUPREME COURT DENYING DISCRETIONARY REVIEW OF THE JUDGMENT OF THE FOURTH DISTRICT COURT OF APPEAL

Petitioner Silver Spur Reserve ("Silver Spur") prays for a writ of certiorari to review an order of the California Supreme Court declining to review the judgment of the Fourth District Court of Appeal of the State of California.

OPINIONS BELOW

The December 15, 2004 order of the California Supreme Court declining discretionary review with respect to the denial of Silver Spur's motion for attorney's fees under 42 U.S.C. § 1988 is included in the Appendix to this petition, at page A-1. The September 20, 2004 decision of the Fourth District Court of Appeal affirming the trial court's denial of Silver Spur's motion for attorney's fees under 42 U.S.C. § 1988 is included in the Appendix to this petition, at pages A-2 through A-28. The November 14, 2003 order of the Riverside County Superior Court denying Silver Spur's motion for attorney's fees under 42 U.S.C. § 1988 is included in the Appendix to this petition at pages A-29 through A-32.

JURISDICTION

The California Supreme Court denied Silver Spur's petition for review on December 15, 2004. This Petition for Certiorari is filed within 90 days of that date. The jurisdiction of this court to review the denial of the petition for review is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the denial of attorney's fees under 42 U.S.C. § 1988, following the violation of a constitutional right to a fair return under 42 U.S.C. § 1983. 42 U.S.C. Section 1988 provides as follows:

> "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. 1681 et. seq.), the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000b et seq.), title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought

> against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

This case also involves the takings and the due process clauses of the fifth and fourteenth amendments to the United States Constitution. The fifth amendment provides in relevant part as follows:

> "No person shall . . . be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation."

The fourteenth amendment provides in relevant part as follows:

> "...Nor shall any State deprive any person of . . . property, without due process of law."

STATEMENT OF THE CASE

Silver Spur Reserve is a California partnership ("Silver Spur"). It owns Silver Spur Mobile Manor, a 215 space mobilehome park located in Palm Desert, California. On September 1, 1993, Silver Spur applied for a $64 per month rent

increase, pursuant to the City of Palm Desert's rent control ordinance. (AR 22-37).[1] The City of Palm Desert appointed an attorney named Richard Erwood to act as its administrative hearing officer with respect to Silver Spur's rent increase application. (AR 2 and 21).

In order to establish that a property is not generating a fair return, property owners must usually submit evidence establishing the dollar amount of their investment, their income and expenses, and their rate of return. Of course, property owners must also submit expert testimony establishing that their rate of return is not "fair." Accordingly, at the underlying administrative hearings in this case, Silver Spur submitted ***all*** of the evidence necessary to establish that it required a $62 rent increase in order to receive a fair return on investment, including the expert report and testimony of Dr. Richard Fabrikant regarding rates of return. (AR 20-747, 909-1491 and

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1 All references to "AR" are to the administrative record from the underlying administrative proceedings. All references to "CT" are to the Clerk's Transcript on Appeal. All references to "RT" are to the Reporter's Transcript on Appeal.

1511-1579). That evidence is summarized as follows:

$6,859,789	Inflation Adjusted Investment (AR 1527, 981)
× 10.74%	Fair Rate of Return (AR 1530, 1511-1579)
$736,741	***1992 Return Required (AR 1530)***
($576,784)	1992 Actual Return (AR 986 and 1540)
$159,957	1992 Return Deficiency (AR 1530)
÷ 215	Spaces (AR 1530)
÷ 12	Months (AR 1530)
.$62.00	***Increase Per Space Per Month (AR 1530)***

On June 13, 1994, the hearing officer issued a decision with respect to Silver Spur's rent increase application. (AR 2593-2617). In that decision, the hearing officer found that the evidence was insufficient to support any rent increase at all. (AR 2613, line 21 through AR 2614, line 15). In addition, the hearing officer made a mathematical error, falsely concluding that Silver Spur had understated its profits by $498,170. (AR 2615, lines 9-18). Although this is the type of mathematical error that may *initially* have been due to "agency confusion," the City of Palm Desert's repeated refusal to address this error, as well as its other actions involving Silver Spur's rent increase application, demonstrate that the City had no intention of granting Silver Spur a $62 rent increase, unless ordered by a

court to do so.

With respect to the hearing officer's initial mathematical error, the uncontradicted evidence showed that in 1992 Silver Spur had gross income of $949,839 and expenses (not including debt service) of $373,055. (AR 1540). Thus, *before* taking debt service into account, Silver Spur had a "net operating income" of $576,784. The uncontradicted evidence also showed that in 1992 Silver Spur's debt service payments totaled $498,170. (AR 1541). Thus, ***after*** taking debt service into account, Silver Spur had a "profit" of only $78,614, calculated as follows:

$949,839	1992 Gross Revenues (AR 1540)
($373,055)	1992 Expenses (AR 1540)
$576,784	*1992 Net Operating Income* (AR 1540)
($498,170)	1992 Debt Service (AR 1541)
$78,614	*1992 Profit* (AR 1540-1541)

Although Silver Spur's financial statement clearly showed that it had ***not*** included its $498,170 in debt service payments as an "expense" in calculating its 1992 ***net operating income***, the hearing officer erroneously concluded that it had. The hearing officer then compounded his error by finding that if Silver Spur had not included debt service as an expense, its

net operating income would have been $1,074,954, instead of $576,784. ($576,784 + $498,170 = $1,074,954). (AR 2615, lines 9-15). The hearing officer further compounded his error by finding that because $1,074,954 exceeded the $736,741 "minimum" net operating income required to provide a fair return that had been established by Dr. Fabrikant, Silver Spur was not entitled to any rent increase at all. (AR 2617, lines 9-11).

There was no evidence anywhere in the record that either Silver Spur's 1992 net operating income or its profits were anywhere near $1,074,954. To the contrary, because Silver Spur's ***gross revenues*** for the entire year were only $949,839, it was mathematically impossible for Silver Spur's "profits" to have been $1,074,954, because "profits" can ***never*** exceed gross revenues. (AR 1540-1541). [2]

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[2] See Black's Law Dictionary, Fifth Edition, which defines "profit" as follows:

> "Profit: Most commonly, the gross proceeds of a business transaction ***less*** the costs of the transaction, i.e., net proceeds. Excess of revenues over expenses..." (Emphasis added).

On June 24, 1994, Silver Spur filed an appeal to the full Rent Review Board, specifically pointing out that the hearing officer had made a $500,000 mathematical error in rendering his decision. (AR 2641, line 22 through AR 2642, line 15; AR 1540-1541). However, the Rent Review Board did not even mention the hearing officer's $500,000 mathematical error in its decision, let alone correct it. Instead, the Rent Review Board simply affirmed the hearing officer's findings, ruling that the evidence was insufficient to support any rent increase at all. (AR 2879). (AR 2634 and AR 2732, line 25 through 2733, line 12).

On February 24, 1995, Silver Spur filed a petition for a writ of administrative mandamus with the Riverside County Superior Court, on the ground that the City's decision had deprived it of a fair return on investment, in violation of its constitutional rights. (CT 97-110). A hearing was set before Judge Fry of the Riverside County Superior Court for November 15, 1996. In its trial brief, Silver Spur set forth the various theories justifying the requested rent increase and again demonstrated that the hearing officer had made a $500,000 mathematical error. (CT 111-140 at 136, line 12 through 137, line

10). The City was represented in the Superior Court proceedings by Douglas Phillips, the same attorney who had represented the Rent Review Board in the underlying administrative proceedings. (CT 142). In his opposition brief, the City Attorney argued that the hearing officer had applied an "historic cost" analysis in rejecting Silver Spur's rent increase application, when in fact the hearing officer had never made such an analysis and no evidence had ever been offered in support of such an analysis. (CT 161, lines 19-22). In its reply brief, Silver Spur strongly objected to the City Attorney's attempt to attribute findings to the hearing officer which were in fact never made by the hearing officer. (CT 181, line 27 through 182, line 10).

After extensive oral argument regarding both the hearing officer's "mathematical error" and the propriety of the City Attorney's attempt to raise the so-called "historic cost" approach for the first time on appeal, Judge Fry remanded the matter back to the Rent Review Board. So as to guarantee that the Rent Review Board would not be improperly influenced by the City Attorney's newly raised argument regarding the so-

called "historic cost" approach, Judge Fry specifically ruled that the Rent Review Board could ***not*** consider any additional information on remand, including the brief prepared by the City Attorney regarding the so-called "historic cost" approach. (CT 193, line 20 through 195, line 21).

At that point, the City Attorney asked Judge Fry if he could at least provide the Rent Review Board with "the transcript" from that November 15, 1996 hearing. (CT 195, lines 11-13). Judge Fry sustained Silver Spur's objections to that request, because providing that transcript would simply be another way for the City Attorney to improperly influence the Rent Review Board regarding his newly raised "historic cost" approach. (CT 195, lines 16-21 and CT 198-200).

On April 3, 1997, the Rent Review Board met pursuant to Judge Fry's remand order. At that hearing, the hearing officer made it clear that he had been provided a copy of the November 15, 1996 Superior Court "transcript," in direct violation of Judge Fry's ruling. At that same time, the hearing officer also made it clear that he understood that his $500,000 mathematical error was one of the key issues before the

Superior Court. (CT 202-204).

On May 6, 1997, the hearing officer issued his amended decision. Although the hearing officer had previously acknowledged that his "mathematical error" was of keen importance in the case, he did not address that "mathematical error" in his amended decision. (AR 2641, line 22 through AR 2642, line 15; See also AR 1540-1541). Rather, the hearing officer again ruled there was not enough evidence to justify any rent increase at all. (CT 205 through 211, at CT 211, lines 8-9).

On May 15, 1997, the Rent Review Board conducted still another hearing, so as to review the hearing officer's amended decision. At the conclusion of the May 15, 1997 hearing, the Board simply reaffirmed the hearing officer's amended decision. Again, however, the Board's amended decision failed to address, let alone correct, the hearing officer's $500,000 "mathematical error." (CT 216-218 at CT 217, line 21 through CT 218, line 2).

On January 23, 1998, Judge Fry conducted a hearing regarding the City's violation of his previous order regarding the City's use of the Superior Court transcripts on remand. (CT

702-708). When the City attempted to argue that it had not intentionally violated his order, Judge Fry indicated the City's argument was not "in good faith" and that he was "really offended" by the City's position. (CT 709, lines 16-28).

On June 3, 1998, Judge Fry issued a judgment, overturning the previous *four* decisions of the hearing officer and the Rent Review Board and concluding that a $58.33 rent increase was required to provide Silver Spur with a fair return on investment. (CT 219 and CT 220-222). Unlike the previous decisions of the hearing officer and the Board, Judge Fry also found that Silver Spur had submitted sufficient evidence to support its rent increase application, and that the hearing officer had failed to consider the evidence that was submitted. (CT 222, lines 1-11).

On July 13, 1998, the Rent Review Board conducted a hearing to determine whether to abide by Judge Fry's decision to grant Silver Spur a $58.33 rent increase. Before that hearing began, the Board swore in a new member, Donald Moran, who admitted that he was not familiar with the issues and was therefore not in a position to vote on the matter at that time.

(CT 445, line 20 through CT 446, line 1).

After Commissioner Moran was sworn in, the Board did not vote on whether to abide by Judge Fry's order at that time. Rather, the Board's first reaction was to discuss ways to amend the ordinance, so as to prevent other parkowners from receiving rent increases similar to that ordered by Judge Fry. (CT 450, lines 3-21).

Next, although Commissioner Moran had already admitted that he was not familiar with the issues, he then decided that he was going to vote on whether to abide by Judge Fry's order after all. (CT 504, lines 1-15). At that time, Commissioner Moran openly expressed his hostility toward Silver Spur as follows:

> COMMISSIONER MORAN: I know how it is to live in a mobile home. Although I don't live in one, my mother does. My mother is an elderly lady, and I appreciate the fact that she lives in a park that's well-run. I appreciate the fact that ***she lives in a park where the owner is concerned about the well-being of the people that live there***. (CT 510, lines 1-10).

(Emphasis added). [3]

When Silver Spur's attorney objected to Commissioner Moran's statements, the Chairman of the Board again expressed his own hostility toward the parkowners, making a gratuitous comment about Silver Spur's alleged "deep, deep pockets." (CT 519, lines 4-13). Commissioner Moran went much further, however, attempting to intimidate Silver Spur's attorney by seeking his hotel room number, to "discuss" the matter after the hearing was over. (CT 519, line 11 through CT 521, line 10).

Because the Board declined to follow Judge Fry's order at the July 13, 1998 hearing, a second hearing was conducted on July 17, 1998. (CT 526-617). That second hearing began with the Board and the City Attorney engaging in a prolonged discussion regarding possible ways to avoid implementing Judge Fry's decision, including refusing to obey Judge Fry's order altogether. (CT 540, line 24 through CT 541, line 10).

After being advised that the Board could suffer serious

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[3] After previously admitting he was not familiar with the case, Commissioner Moran voted not to abide by Judge Fry's order granting Silver Spur a $58.33 rent increase. (CT 512, line 13 through CT 513, line 17).

consequences if it violated Judge Fry's order, the Chairman of the Board expressed his confidence that there would be no such repercussions, stating he was not "in the least bit worried that the court" would sanction the Board. (CT pg. 542, lines 15-17).

At that point, the City Attorney and the Board also considered avoiding compliance with Judge Fry's order by arguing that the individual Board members had not been personally served with Judge Fry's order, even though the City Attorney had already acknowledged receipt of service of that order on June 19, 1998. (CT 542, line 23 through CT 543, line 3). In order to avoid such an argument, Silver Spur personally served each Board member, on the record. (CT 569, line 15 through CT 570, line 7). Immediately after being served, Chairman Adams admitted that he had "already seen a couple of copies of it," further demonstrating that the Board's actions were not the result of "bureaucratic bumbling," but a deliberate attempt to obstruct Silver Spur's ability to obtain rent increases that it was otherwise entitled to. (CT 570, lines 4-6). At the conclusion of the July 17, 1998 hearing, the Board reluctantly voted to abide by Judge Fry's order allowing Silver Spur to raise

rents by $58.33 per month. (CT 611, line 3 through 613, line 16).

On November 12, 1998, Silver Spur filed its motion for attorney's fees and costs with the Riverside County Superior Court. On January 13, 1999, Judge Fry awarded Silver Spur attorney's fees in the sum of $85,501, based on the City's violation of its constitutional right to a fair return. (CT 619 -620, at 620, lines 3-9). On January 29, 1999, the City appealed Judge Fry's award of attorney's fees to the Fourth District Court of Appeal. (CT 399-403).

While the City's appeal was pending, the California Supreme Court issued its decision in Galland v. City of Clovis, 24 Cal 4th 1003 (2001). Accordingly, the Fourth District Court of Appeal remanded Silver Spur's motion for attorney's fees to the Superior Court for reconsideration in light of Galland. (CT 645 through 653).

Pursuant to the Fourth District Court of Appeal's remand order, Silver Spur filed a second motion for attorney's fees with the Riverside County Superior Court on June 14, 2002. (CT 409-430). At the hearing on that motion, Judge Fry recused himself from further participation in the case. (CT 721). Then,

on April 28, 2003, the presiding judge inexplicably recused every single judge in Riverside County from participating in the case. (CT 731 - 734, at 734, lines 8 through 9).

On May 13, 2003, the matter was transferred to Judge Robert Drake, of the San Bernardino County Municipal Court. (CT 736). At the hearing before Judge Drake, the City Attorney, who was also the attorney for the supposedly neutral Rent Review Board, admitted that his job was *not to be fair* to Silver Spur, stating as follows:

> CITY ATTORNEY: ***[I]s the city attorney's position simply to be a judge and be fair and impartial*** and second guess the board and say, you know, board, I don't think your right. I'm not going to really advocate and I'm not really going to support your position before the superior court. ***Well, I don't think so.*** (RT 39, lines 13-20). (Emphasis added).

On October 7, 2003, Judge Drake issued his ruling, denying Silver Spur's motion for attorneys fees in its entirety, finding that the City's conduct, "however distasteful," did not warrant an award of attorney's fees under 42 U.S.C. Section

1988 and/or the California Supreme Court's decision in Galland. (A-31 through A-32). On September 29, 2004, the Fourth District Court of Appeal affirmed Judge Drake's decision. (A-28). On December 15, 2005, the California Supreme Court denied Silver Spur's petition for review. (A-1).

Unless Judge Drake's ruling is reversed, Silver Spur must return to an openly hostile Rent Review Board to seek more than $1,000,000 in "back" rents now owing in this case, with ***no*** protection whatsoever from the treatment it has endured during the past twelve years. To the contrary, the Rent Review Board will only be emboldened, if it knows its conduct will later be deemed "inadvertent errors" or "honest mistakes." Because the evidence demonstrates that the City's agents "deliberately committed obstructive and unlawful acts designed to interfere with [Silver Spur's] property rights," the decision denying Silver Spur's attorney's fees under 42 U.S.C. Section 1988 must be reversed.

LEGAL ARGUMENT

A. SILVER SPUR IS ENTITLED TO ITS ATTORNEY'S FEES UNDER 42 U.S.C. SECTION 1988

Under 42 U.S.C. Section 1988, a party is entitled to recover its attorney's fees and costs if it establishes a violation of its constitutional rights under 42 U.S.C. Section 1983. An award of attorney's fees is appropriate in ***all*** types of actions involving the violation of constitutional rights, not merely those involving invidious discrimination. Maine v. Thiboutot, 448 U. S. 1, 10 (1980). In fact, the courts have specifically held that a party may recover attorney's fees from a city if the party successfully challenges the unconstitutional application of a municipal ordinance. Aware Woman Clinic v. City of Cocoa Beach, 629 F. 2d 1146, 1148-1149 (5th Cir. 1980).

A party is entitled to attorney's fees under 42 U.S.C. Section 1988 if the judgment is entered in its favor, even though the party does not prevail on its entire claim. Bly v. McLeod, 605 F. 2d 134, 137 (4th Cir. 1979). Thus, where a party has established a violation of its constitutional rights, the court has little discretion to deny an award. As stated by this Court in New York Gaslight Club v. Carey, 447 U. S. 54, 68 (1980):

> "...the court's discretion to deny a fee award to a prevailing

> Plaintiff is narrow. Absent 'special circumstances' fees should be awarded."

In Galland v. City of Clovis, 24 Cal. 4th 1003 (2001), the owner of a mobilehome park sought attorney's fees pursuant to 42 U.S.C. Section 1988, based on the violation of two distinct constitutional rights. First, the parkowner alleged that the mere failure to provide a fair return resulted in a "taking," warranting an award of attorney's fees. (Id. at 1020). Second, the parkowner alleged that the City's bad behavior in ruling on the application resulted in a separate violation of his rights under the due process clause, providing a separate basis for an award of attorneys fees. (Id. at 1020). The Galland Court found that a parkowner could rarely, if ever, establish a right to attorneys fees based on the denial of a fair return under the "takings" clause. The Galland Court reasoned that if the parkowner ultimately establishes his right to a fair return in state court, there has been no "taking," and therefore no right to attorneys fees. (Id. at 1021-1028).

On the other hand, the Galland Court found that a parkowner could establish a right to attorneys fees under the

due process clause. In order to do so, a parkowner must establish that the denial of a fair return was not due to "[i]nadvertent errors, honest mistakes, agency confusion, [or] negligence in the performance of official duties." (Id. at 1034). Rather, a parkowner must establish that the government or its agents intentionally obstructed its ability to obtain a fair return:

> "To succeed in a § 1983 suit for damages for a substantive due process violation, a Plaintiff must at least show that state officials are guilty of grave unfairness in the discharge of their legal responsibilities."
>
> . . .
>
> In cases such as the present, a deliberate flouting of the law may be said to have occurred if the City's . . . [actions were designed to] ***obstruct or discourage landlords from either requesting or obtaining reasonable rent increases to which they are constitutionally entitled.***
>
> . . .
>
> In determining whether a constitutional injury has taken place, we follow the path of the United States Supreme Court, and other courts in asking whether government agents have ***deliberately committed obstructive and unlawful acts designed to interfere with the [the***

parkowner's] property rights.
(Id. at 1034, 1036, 1039-1040).

The primary issue to be decided in this case is whether the City's actions can fairly be deemed the "honest mistakes" of a neutral agency, or whether they constitute deliberate acts by government agents, aimed at "discourag[ing] landlords from either requesting or obtaining reasonable rent increases to which they are constitutionally entitled." (Id. at 1036). A review of the facts and the established law demonstrate that the City's actions were not inadvertent mistakes, but the result of a deliberate attempt to discourage or prevent Silver Spur from receiving a legitimate and constitutionally mandated rent increase. Accordingly, Silver Spur must be allowed to recover its attorney's fees under 42 U.S.C. Section 1988 and/or the standards established by the California Supreme Court in Galland. The "deliberate" acts of the City of Palm Desert are summarized below:

(i.) **Deliberate Disrespect For Court Orders**: A party to administrative writ proceedings may not raise issues in the Superior Court that were not raised at the administrative

hearing. Bohn v. Watson, 130 Cal. App. 2d 24, 36-37 (1954). In addition, if a party disagrees with a court order its remedy is to appeal, not to disregard the court's authority. In Re: Charboneau, 42 Cal. App. 3d 505, 514 (1974).

In this case, the City Attorney raised arguments about the so-called "historic cost" approach in the Superior Court that were never raised at the administrative level. When Judge Fry issued an order prohibiting the hearing officer and the Rent Review Board from being apprised of those new arguments, the City blatantly and unapologetically violated that order.

The only possible reason for the City to raise those new arguments, or to violate Judge Fry's order, was to help the tenants avoid a rent increase to which Silver Spur was constitutionally entitled. When the City attempted to justify its violation of his order, Judge Fry indicated that the City's defense was "in bad faith." (CT 709, lines 16-28).

Moreover, when Judge Fry finally awarded Silver Spur a rent increase, the Rent Review Board discussed a variety of ways to avoid that order, ranging from claiming it had not been served to simply disregarding it. (CT 540, line 24 through CT

541, line 5). When confronted with the possibility of being held in contempt for violation of Judge's Fry's order, the Chairman of the Rent Review Board brazenly declared he was "not in the least bit worried that the court" would sanction the Board. (CT pg. 542, lines 15-17).

The above described acts do not support a finding that the City's failure to provide a rent increase was due to "honest mistakes" or "inadvertent errors" by an otherwise fair agency. Rather, the above acts constitute substantial evidence of the City's deliberate attempt to prevent or discourage Silver Spur from receiving legitimate rent increases, in violation of Silver Spur's constitutional rights. Of course, Silver Spur's position on this issue was bolstered substantially by the attorney for the supposedly neutral Rent Review Board, when he boldly stated at the hearing before Judge Drake that his job was not to be fair or neutral with respect to Silver Spur: (RT 39, lines 13-20).

(ii.) Other Deliberate Acts In Favor of Tenants and Against Parkowners: As demonstrated above, one member of the Board voted against the rent increase, even though he had not reviewed the record, because he thought the owner of his

mother's mobilehome park cared more about his tenants than the owner of Silver Spur. See English v. City of Long Beach, 35 Cal. 2d 155, 158-159 (1950); LeStrange v. City of Berkeley, 210 Cal. App. 2d 313, 325 (1962). That same member then threatened to come to the hotel room of Silver Spur's attorney, presumably because he wanted to fight or argue over the case, thereby becoming personally embroiled in the matter. See Menning v. City Council, 86 Cal. App. 3d 341, 351 (1978); Appelbaum v. Board of Directors, 104 Cal. App. 3d 648, 659-660 (1980).

Another member of the Board immediately inquired about amending the ordinance as soon as Silver Spur was awarded a rent increase, so as to prevent other parkowners from recovering similar rent increases. That same member also considered contesting service in order to avoid complying with Judge Fry's order, even though he later admitted that he had seen several copies of the court's order and was not in the least bit concerned about being punished for violating that order.

None of the above described acts are consistent with a finding that the City's failure to grant a rent increase (on four

separate occasions) was the result of "inadvertent errors" or "honest mistakes" by an otherwise fair agency. Rather, each of the above acts demonstrate that the City was committed to preventing Silver Spur from receiving a rent increase, even after being ordered by a court to do so.

(iii) Refusal To Provide Findings of Fact Regarding Obvious "Mathematical Errors": An administrative agency "must set forth findings to bridge the analytic gap between the raw evidence and [the] ultimate decision or order," thereby enabling a reviewing court to trace "the analytic route the administrative agency traveled from evidence to action." Topanga Assn. for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 515 (1974). As is evidenced by Judge Fry's granting of a $58.33 rent increase, Silver Spur submitted all of the evidence necessary to support its rent increase application at the very first administrative hearing in this matter. Although the hearing officer and the Board repeatedly found that Silver Spur had not submitted sufficient evidence to justify a rent increase, they repeatedly refused to identify how Silver Spur's evidence was lacking.

More specifically, although both the hearing officer and the Board were apprised of the $500,000 "mathematical error," they refused to discuss that error in any of their subsequent decisions, despite having at least three opportunities to do so. Because there was sufficient evidence to rule on the application, and because the hearing officer's "mathematical error" was repeatedly explained to both the hearing officer and the Board, their continuing refusal to provide specific findings regarding either of those issues again supports the conclusion that the failure to grant a rent increase was not due to an "innocent mistake," but ā deliberate attempt to prevent Silver Spur from receiving a fair return.

B. THE PETITION FOR A WRIT OF CERTIORARI MAY BE GRANTED UNDER SUPREME COURT RULE 10

Silver Spur recognizes that a petition for a writ of certiorari may only be granted for compelling reasons. Silver Spur also recognizes that a petition will rarely be granted where the asserted error consists primarily of a misapplication of the law to the facts. However, due to a procedural quandary

created by the California Supreme Court's decision in Galland v. City of Clovis, 24 Cal. 4th 1003, 1040 (2001), Silver Spur has found itself in a position where it appears it must fully exhaust its appeals, or risk being deemed to have "waived" its right to seek additional rent increases from the Palm Desert Rent Review Board under the due process clause.

In Galland, the California Supreme Court found that even if a landlord is not entitled to attorney's fees under 42 U.S.C. Section 1988, the landlord is "not necessarily without a remedy." (Id. at 1040) Specifically, the California Supreme Court found that if it is ultimately determined that the government's actions did "not rise to a deliberate flouting of the law," a landlord may then attempt to recover its attorney's fees and costs in the form of a rent increase from its tenants, if necessary to secure a "fair return" under the due process clause. (Id. at 1040). Of course, in order to recover its attorney's fees in the form of a rent increase under the due process clause, the landlord must appear before the very agency it previously accused of deliberately "flouting the law," and request that agency to order the tenants to pay that rent increase.

Unfortunately, the California Supreme Court has provided no guidance as to how far a landlord must go in attempting to demonstrate that the government "deliberately flouted" the law before seeking its attorney's fees in the form of a rent increase under the due process clause. As a result, Silver Spur is concerned that if it does not completely exhaust its appeals with respect to its claim for attorney's fees under 42 U.S.C. Section 1988, the tenants will argue, and the City of Palm Desert Rent Review Board will agree, that Silver Spur has "waived" its right to seek its attorney's fees from the tenants in the form of a rent increase.[4] Because it is unclear whether Silver Spur must exhaust its appeals all the way to the United States Supreme Court in order to avoid a finding that it has "waived" its right to seek its attorney's fees from its tenants under the due process clause, Silver Spur has filed this petition not only to obtain review of the decisions of the California courts, but also to attempt to overcome the procedural quandary that appears

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[4] It should be noted that Judge Tranbarger and the attorney for the City of Palm Desert also recognized this procedural quandary in the Superior Court proceedings, with Judge Tranbarger concluding: "Who wants to say why this is a good idea." (RT pg. 3, line 3-pg. 4, line 27).

to have been created by the California Supreme Court's decision in Galland.

CONCLUSION

The City's repeated denial of Silver Spur's rent increase application was not the result of "inadvertent errors" or "honest mistakes." Because the City did not act as a fair and neutral arbiter of disputes between landlords and tenants, but deliberately attempted to prevent Silver Spur from recovering rent increases to which it was constitutionally entitled, Silver Spur is entitled to its attorney's fees under 42 U.S.C. Section 1983 and/or the "due process" standards established by the California Supreme Count in Galland v. City of Clovis.

March 9, 2005 Respectfully submitted,

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Counsel of Record

(2) Supreme Court, U.S.
FILED

No. 041241 MAR 11 2005

OFFICE OF THE CLERK

In The
Supreme Court of the United States

Silver Spur Reserve, a California General Partnership, dba Silver Spur Mobile Manor
Petitioner and Appellant,

v.

The City of Palm Desert and the Palm Desert Rent Review Board,
Respondents and Appellees.

The Tenants Residing at Silver Spur Mobile Manor
Real Parties in Interest.

On Petition for Writ of Certiorari to the California Supreme Court

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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(510) 336-1536

Counsel for Petitioner

*Counsel of Record

Court of Appeal, Fourth Appellate District, Division Two - No. E034854

S129035

IN THE SUPREME COURT OF CALIFORNIA

En Banc

SILVER SPUR RESERVE, Plaintiff and Appellant,

v.

CITY OF PALM DESERT, et al., Defendants and Respondents;

TENANTS RESIDING AT SILVER SPUR MOBILEHOME PARK et al., Real Parties in Interest

---

Petition for review DENIED.

Supreme Court
Filed
DEC 15, 2004
Frederick K. Ohlrich Clerk

Deputy

GEORGE
Chief Justice

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

Filed
SEP 20, 2004
Court of Appeal - Fourth District

SILVER SPUR RESERVE, Plaintiff and Appellant, v. CITY OF PALM DESERT, et al., Defendants and Respondents.	E034854 (Super Ct. No. RIC 390013) OPINION
THE TENANTS RESIDING AT SILVER SPUR MOBILEHOME PARK et al., Real Parties in Interest and Respondents.	

APPEAL from the Superior Court of Riverside County. Robert S. Drake, Judge. (Retired Judge of the Mun. Ct. Big Bear for the San Bernardino Jud. Dist. assigned by the

Chief Justice pursuant to art. VI, Section 6 of the Cal. Const.)

Affirmed.

Law Office of Anthony Rodriguez and Anthony C. Rodriguez for Plaintiff and Appellant.

Best, Best & Krieger and Douglas S. Phillips for Defendants and Respondents.

No appearance for Real Parties in Interest.

Following lengthy administrative proceedings, Silver Spur Reserve (Silver Spur) prevailed in its petition for a discretionary hardship rent increase at its mobilehome park. In a previous appeal, Nos. E023514 and E024376, this court reversed an attorney fees award in favor of Silver Spur and remanded the matter for reconsideration in accordance with the new standards announced in Galland v. City of Clovis (2001) 24 Cal. 4th 1003 (Galland).

On remand, the trial court denied the attorney fees request. Silver Spur appeals from that decision.

FACTS AND PROCEDURAL BACKGROUND

On September 1, 1993, Silver Spur applied for a discretionary hardship rent increase under the Palm Desert

Mobile Home Park Review Ordinance. In the previous appeal, we noted: "Section 9.50.060 of the ordinance states the maximum rent that may be charged for a mobilehome space, subject to the hardship situations. The guidelines implementing the ordinance provide that increases will be allowed to permit rent to be established at a level which will provide landlords with a fair return on their property consistent with the Palm Desert Mobile Home Park Rent Ordinance, and the laws of the State of California." This provision is consistent with well-established law. (See, e.g., Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 165; Cotati Alliance for Better Housing v. City of Cotati (1983) 148 Cal. App. 3d 280.[1])"

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[1] "Constitutionally valid rent control schemes must allow park owners to earn a 'just and reasonable' or 'fair' return on their investment. [Citations.] The term 'fair and reasonable' is incapable of precise definition [citation], but is generally considered to include returns that are 'commensurate with returns on investments in other enterprises having corresponding risks' [citation], or high enough to encourage good management, reward efficiency, discourage the flight of capital, and enable operators to maintain their credit.' [Citation.] (Donahoe v. Santa Paula West Mobilehome Park (1996) 47 Cal. App. 4th 1168, 1177.

Our previous opinion continued:

"Silver Spur's application sought a discretionary hardship of at least $64 per space per month. The application asserts that this sum is necessary to provide it with the required fair return on its investment. The application also alleges that the mobilehome park was purchased in 1977, that Silver Spur had made substantial investments in infrastructure and amenities since then, but that there had been no corresponding increase in rental rates.[2] The residents of the mobilehome park were notified of the application and, predictably, opposed it.

"An amended application was filed and heard for four days, beginning on February 4, 1994. Silver Spur presented and relied primarily on the testimony and reports of Gerald Taylor, an appraiser, and Richard Fabricant, an economic

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[2] There was, however, a 1988 settlement agreement between Silver Spur and tenants. The agreement provided certain specified rent increases. It expired in April 1993, and it did not restrict rent increases after that time. We considered certain aspects of the settlement agreement and related issues in Silver Spur Homeowner's Association v. Silver Spur Reserve (E020988), an unpublished opinion filed on November 13, 1998.

consultant, to support its claims. Mr. Fabricant testified that a fair rate of return on the property would equate to a monthly per space rental increase of approximately $62. His report states that a $62 per space per month increase is necessary to provide Silver Spur with a 12.7 percent rate of return on its investment, based on historical data.

"Counsel for the tenants vigorously opposed the request and called his own witnesses. The hearing concluded on March 30, 1994. The hearing officer filed a 24 page decision which concluded that Silver Spur had failed to prove that it was entitled to a hardship rent increase."

Silver Spur filed an appeal on June 28, 1994, to the Rent Review Board, disagreeing primarily with the hearing officer's treatment of the debt service expense-the hearing officer had declined to deduct the debt service expense from gross income based on the hearing officer's conclusion that the debt service arose from refinancing the mobilehome park for $4.3 million, and the proceeds of the refinancing had not been used to benefit the property.

The Rent Review Board conducted a hearing on

December 2, 1994, at which the board considered and rejected Silver Spur's position on the appropriate treatment of the debt service expense. For example, one member of the board stated, "[The mobilehome park owner's] investment in that property now, as far as I can see from a commonsensical approach, is 3.2 million because he pocketed the 4.3. He took out of that investment 4.3 million. So now what is his rate of return on the remaining equity of 3.2? It appears that that is a sufficient amount. I mean you would concede that 576,000 [the net operating income when the debt service expense was disregarded] is a fair rate of return if you consider the 3.2 million as the investment, wouldn't you? Another board member framed the issue, based on his understanding of the controlling authorities, as what would be a "net return on investment, not on market value and not on equity," and therefore the important determination was not the current market value of the property or the amount taken out in the refinancing of the property, but the owner's initial investment in the property. The discussion again focused on what the owner's initial investment has been and what the $4.3 million

in proceeds from the refinancing had been used for.

The attorney representing the mobilehome park residents stated that because the $4.3 million had been used for personal purposes, it would be unfair to the park residents to burden them with the debt service for the refinancing: "My position is that just like any other businessman who finances their personal loan, he has an obligation to pay it back. Well, he's got $576,00. That's what he's using-you know, he can pay it back out of the profits of the park. But that's no reason to burden the park residents to pay off a loan that is being used for his personal purposes . . . Plus he's getting a return on that money somewhere else, obviously."

In contrast, counsel for Silver Spur argued strenuously that the board should apply an inflation adjusted method, based on the original purchase price and original cost of capital improvements, adjusted for inflation since the date of each expenditure, leading to a value for the mobilehome park of $6.8 million, and the fair return should be based on that figure. Ultimately, the Rent Review Board rejected Silver

Spur's arguments, adopted the hearing officer's finding, and ruled that the evidence did not support any rent increase. Silver Spur requested reconsideration of that decision. The board denied the request.

Silver Spur filed a petition for a writ of administrative mandamus in the Riverside County Superior Court on February 24, 1995, on the ground that the City's decision had deprived it of a fair return on investment in violation of its constitutional rights. In its trial brief, Silver Spur again argued that the hearing officer had erred by failing to deduct the debt service expense from gross profits.

In the City's trial brief, the City's attorney, who has also represented the City in the administrative proceedings, argued that the hearing officer had applied an "historic cost" analysis in rejecting Silver Spur's rent increase application, although the hearing officer had not articulated any such analysis, and no evidence had been offered in support of such an analysis. Silver Spur objected to this line of argument. After conducting a hearing on the writ petition on November 15, 1996, the trial court remanded the matter to the Rent

Review Board for further findings "regarding the evidence the Board relied on in calculating the parkowners' investment in the property, the parkowners' return on investment and the formula, if any, the Board used in determining whether the parkowners' rate of return was fair." The trial court, at the hearing on November 15 and in its written order on February 20, 1997, ruled that the Rent Review Board could not consider any new information on remand, but the Rent Review Board was to "base their decision on strictly the administrative record," and neither the Rent Review Board nor the hearing officer was to consult with the attorney for the City before rendering their decision on remand.

The Rent Review Board held a study session on April 3, 1997, for the purpose of preparing for the April 9 hearing on remand. The deputy city attorney informed the board that the purpose of the remand was "for this body to render findings which would bridge the gap between the evidence, adduced by your hearing officer, and the ultimate conclusion that was reached to deny the petition for the discretionary rent increase." The deputy city attorney further informed the

board that neither the board nor the hearing officer was to adduce new evidence, but they were to base their decision solely on the existing administrative record. The hearing office revealed, however, that he had seen a copy of the transcript of the superior court ruling, despite the trial court's order. Counsel for Silver Spur objected strenuously to the use of the court transcript or trial briefs in proceedings. At the hearing on April 9, the board remanded the matter to the hearing officer for further findings.

On May 6, 1997, the hearing officer issued a supplemental decision in which he again recommended a finding that the evidence was insufficient to justify any rent increase. On May 15, 1997, the Rent Review Board conducted a hearing to review the hearing officer's amended decision, after which the board affirmed the hearing officer's amended decision.

Silver Spur filed a motion for writ of mandate in the superior court on September 26, 1997, and also moved to hold the board and its attorneys in contempt for violation of the trial court's earlier order restricting the use of the transcript of

the November 15 hearing. At the hearing on the motions, Silver Spur withdrew its motion for contempt. The trial court entered judgment overturning the previous decisions of the hearing officer and the Rent Review Board and finding that a rent increase of $58.33 was required to provide Silver Spur with a fair return on investment.

On July 13, 1998, the Rent Review Board conducted a hearing at which only two of the three board members present voted to comply with the trial court's ruling; a vote of at least three members was required to take action on the matter. A second hearing was held on July 17, 1998, at which the board voted to allow Silver Spur to raise rents by $58.33 per space per month in accordance with the trial court's order.

On November 12, 1998, Silver Spur filed a motion in the trial court for attorney fees, and the court awarded Silver Spur attorney fees in the amount of $85,501 based on the City of Palm Desert's (City's) violation of Silver Spur's constitutional right to a fair return. The City appealed the award to this court, and we remanded for further

consideration of the attorney fees award under the standards of Galland.

On remand, the court denied the request for attorney fees. The court explained: "After reviewing the pertinent documents, receiving oral argument, and reviewing the applicable law, the court now denies the Plaintiff's motion for said attorney's fees. Although many authorities were cited, the leading California case on the subject is Galland v. City of Clovis, 24 Cal. 4th 1003 . . . In that case the court observed that "The cognizable level of executive abuse of power is that which shocks the conscience. The mere finding that a government decision is arbitrary or capricious is not sufficient to establish a due process violation. Only a substantial infringement of state law prompted by person or group animus, or a deliberate flouting of the law that trammels significant personal or property rights qualifies for federal civil rights relief under 28[sic] U.S.C., 'Section 1983'. Even though the City's conduct may have been arbitrary, negligent or bureaucratic, there was no evidence presented to the court that such conduct, however distasteful, was outrageous or

egregious. Thus, the standard established by Galland was [not] met."

DISCUSSION

I. STANDARD OF REVIEW

The right to recover attorney fees in this case arises under 42 United States Code Section 1988(b), which provides: "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. Section 1681 et seq.], . . . the court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs,. . . . " We review the trial court's determination of entitlement to attorney fees under 42 United States Code sections 1983 and 1988 for abuse of discretion. (McFadden v. Villa (2001) 93 Cal. App. 4th 235,237.)

Silver Spur, however, contends that the decision to award or deny fees is reviewed de novo. Although Silver Spur is correct that the determination of the legal basis of an award of fees is a question of law, reviewed de novo (Carver v Chevron U.S.A., Inc. (2002) 97 Cal. App. 4th 132, 142), that

test applies only to the determination whether, in the particular case, a contract or statute allows an award of attorney fees. In the previous appeal, this court held that a legal basis existed for an award of attorneys fees if the standards set forth in Galland are met. However, we assess the trial court's application of those standards under the abuse of discretion test. The fact that the judge who ruled on the matter on remand was not the same judge who awarded attorney fees under the pre-Galland standards does not alter our standard of review.

The Galland Test

In Galland, the Plaintiff mobilehome park owners claimed damages from the Defendant city's Mobile Home Rent Review Commission for inverse condemnation, denial of substantive and procedural due process, and civil rights violations under 42 United States Code section 1983. The trial court awarded damages, and the appellate court affirmed. On review, however, the Supreme Court reversed and remanded for further assessment of the issue. The court noted that the Plaintiffs had brought "two distinct due

process claims under section 1983, corresponding to two different types of economic injury." The court explained that the first type of injury stemmed from the city's failure to fully grant the requested rent increases, resulting in confiscatorily low rents." (Galland, supra, 24 Cal. 4th at p. 1020). With respect to these damages, the court held that a Kavanau[3] adjustment would preclude section 1983 damages "if it is adequate to prevent constitutional injury by compensating for previous excessively low rent ceilings." (Galland, at p. 1008). The court thus remanded the matter for determination of a Kavanau adjustment. (Galland, at pp. 1008-1009.)

The court noted that the second type of injury was a substantive due process claim arising from the administrative and legal expenses incurred as a result of the arbitrary proceedings. The court framed the question as "whether [the

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[3] In Kavanau v. Santa Monica Rent Control Board (1997) 16 Cal. 4th 761, the Supreme Court held that under rent control, "adjustment of future rents was generally sufficient to compensate for prior rent ceilings that were set so low as to be confiscatory, and that such adjustments precluded a claim for inverse condemnation." (Galland, supra, 24 Cal. 4th at p. 1008).

city's] actions during the rent adjustment hearings of 1988 to 1990, independent of the outcome of those hearings . . . , violated the [Plaintiffs'] substantive due process rights." (Galland, supra, 24 Cal. 4th at p. 1030). The court held that a mere finding that a government decision was arbitrary or capricious was not sufficient to establish a substantive due process violation; rather, ". . . .[o]nly a substantial infringement of state law prompted by personal or group animus, or *a deliberate flouting of the law that trammels significant personal or property rights*, qualifies for relief under section 1983 . . . Inadvertent errors, honest mistakes, agency confusion, even negligence in the performance of official duties, do not warrant redress under this statute." (Galland, supra, at p. 1034, quoting Silverman v. Berry (D.C. Cir. 1988) 845 F. 2d 1072, 1080. The court therefore remanded the matter for consideration under this new test for gauging constitutional injury. The court noted that "even if [the city's] actions do not rise to a deliberate flouting of the law, the [Plaintiffs] are not necessarily without a remedy," referring to an appropriate Kavanau adjustment. (Galland, at p. 1040).

The Law of the Case Doctrine Does Not Apply

In the previous appeal, the trial court denied the Plaintiff's request for attorney fees under Government Code Section 800. That section allows recovery of attorney fees up to $7,500 when the court finds that certain actions by government entities are arbitrary and capricious. We stated that "[t]he trial court did not abuse its discretion in declining to award attorneys fees under this section, and. . . .'An erroneous interpretation of the law does not suggest per se that the action of the public entity or an officer thereof was arbitrary or capricious." [Citations.]" We therefore stated that the trial court did not abuse its discretion in failing to award attorney fees under Government Code section 800. The City argues that this holding is law of the case, and the prior trial court finding that the City had not acted arbitrarily and capriciously precludes an award of attorney fees under Galland, which required that governmental action be more than arbitrary and capricious.

The "law of the case" doctrine precludes a party from obtaining appellate review of the same issue more than once

in a single action. "When a reviewing court 'states in its opinion a principle or rule of law necessary to the decision, that principle or rule of law becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal, ...[Citations.] In order for the doctrine to apply, "'the point of law involved must have been necessary to the prior decision [and] the matter must have been actually presented and determined by the court, . . . '" [Citations.]' [Citation.]" (Katz v. Los Gatos-Saratoga Joint Union High School Dist. (2004) 117 Cal. App. 4th 47, 62.)

Here, although Silver Spur requested attorney fees under both 42 United States Code section 1988 and Government Code section 800, the trial court's order mentioned only the former statute: "The Petitioner is the prevailing party in this action, having established a violation of its constitutional right to a fair return on investment . . . The Petitioner is also entitled to recover its attorneys fees in the sum of $85,501, pursuant to 42 U.S.C. Section 1988." The sum awarded, $85,501, was the amount requested in Silver

Spur's memorandum of costs. The trial court having awarded the entire sum requested under section 1988, the trial court was not required to reach Silver Spur's entitlement to attorney's fees under Government Code Section 800, and, as noted, the trial court's order does not even mention Government Code section 800. We thus conclude that the discussion of Government Code section 800 was not necessary to our holding in the prior appeal and was therefore dicta. Indeed, as the City points out, an express finding that the City was not arbitrary and capricious during the proceedings would have precluded an award of fees under the Galland standard, which requires a showing even greater than merely arbitrary and capricious actions, and would have made our remand for consideration of the Galland standard an idle act. Thus, the law of the case doctrine does not apply.

II. Compliance with Trial Court Orders

Silver Spur argues a number of different actions taken during the course of the administrative proceedings show that the Galland standard was met.

Silver Spur first argues that the City failed to comply with court orders.

In the first writ proceedings in the Riverside County Superior Court, the attorney for the City raised an argument, over Silver Spur's objection, about the "historic cost" approach that was never raised during the administrative proceedings. Silver Spur argues that when the court prohibited the hearing officer and the Rent Review Board from being apprised of this new argument, the City violated that order. Even accepting, for purposes of argument, that the City violated the trial court's order by providing the hearing officer with a copy of the transcript of the November 15 court hearing, we perceive no prejudice to Silver Spur from that violation. The court's purpose in restricting use of the transcript was to limit the board to the same administrative record on remand and to prevent the board from coming up with an after the fact justification for its earlier decision by applying a theory, the historical cost approach, that had not been previously raised or relied on. Our review of the record does not show that the hearing officer or the board applied

the historical cost approach in the proceedings on remand. Thus, even if the court order was violated, that violation does not establish any prejudice to Silver Spur.

Silver Spur also argues that the City should not have raised the "historic cost" method at the hearing in the trial court. However, making an unsuccessful argument does not amount to a deliberate flouting of the law, nor does an erroneous interpretation of the law suggest an argument was arbitrary or capricious. (See Indian Springs, Ltd. v. Palm Desert Rent Review Board. (1987) 193 Cal. App. 3d 127, 137.)

Silver Spur argues that the Rent Review Board discussed ways of avoiding the court's award of a rent increase to Silver Spur and discussed amending the ordinance to avoid a similar result in other cases. The fact remains that the Board did vote to comply with the trial court's order, even if the board discussed alternatives. Moreover, an administrative body's discussion of the alternatives available to it falls far short of meeting the Galland standard.

III. A Fair Hearing Before a Fair Tribunal

Silver Spur argues that it was denied a fair hearing

before a fair tribunal. Silver Spur states that one member of the board voted against a rent increase even though he had not reviewed the record. Silver Spur has failed to cite any authority supporting its argument. Moreover, the vote took place after a lengthy debate and presentation. Silver Spur also points out that that same board member who had not read the record "threatened to [meet] Silver Spur's attorney, presumably because he wanted to fight or argue over the matter, . . . " This incident occurred at the board hearing on July 13, 1998, at which no conclusive action was taken. The same board member was not present at the hearing on July 17, at which the board voted to comply with the trial court's order awarding Silver Spur a rent increase. This incident is insufficient to meet the standards required under Galland.

Silver Spur further notes that the hearing officer was handpicked by the City with no input by the parkowners. The record does not show, however, that Silver Spur objected to the hearing officer, and we thus deem any objection waived for purposes of appeal. (See Baxter Healthcare Corp. v. Denton (2004) 120 Cal. App. 4th 333, 371 fn. 8 (Baxter)

["points not urged in the trial court will not be considered for the first time on appeal."].

Silver Spur further notes that the same lawyer acted as attorney for the Rent Review Board and for the City in the same proceeding and contends that this was improper. This argument was not presented in the trial court, and we decline to address it for the first time on appeal. (Baxter, supra, 120 Cal. App. 4th at p. 371 fn. 8.)

Silver Spur argues that the hearing officer and the Rent Review Board arbitrarily refused to accept uncontradicted and unimpeached expert testimony concerning the rates of return on investment--Dr. Fabricant testified that $736,741 was the minimum net operating income required to provide a fair return, and the City produced no evidence to rebut that testimony. Silver Spur contends the hearing officer erroneously concluded that Silver Spur had an annual profit of $1,000,000, based on the hearing officer's erroneous treatment of Silver Spur's debt service, and Silver Spur further contends that the hearing officer and the board consistently failed to correct that mathematical

error, despite having the error pointed out to them repeatedly. Silver Spur argues that this is evidence that the City was deliberately attempting to prevent Silver Spur from receiving a fair return.

Our own review of the record shows that rather than merely making and repeating a mathematical error, the hearing officer and the board were attempting to interpret controlling authorities concerning return on investment and to apply those authorities to the evidence in the record. The fact that the hearing officer and the board reached a different conclusion as to the application of those authorities does not suffice to meet the Galland standard.

V. Findings of Fact

Silver Spur argues that the City failed to provide findings of fact to support its denial of a rent increase. This argument was not raised in the trial court, and we decline to address it for the first time on appeal. (Baxter, supra, 120 Cal. App. 4th at p. 371 fn. 8.)

VI. Opportunity to Rebut Presumption

Silver Spur argues that the City failed to allow Silver

Spur to rebut a presumption in the rent control ordinance. The rent control ordinance contains a presumption that adjusting base year profits for 50 percent of the increase in the inflation rate will result in a fair return in future years. The maximum amount of net operating income allowed under this presumption was $394,908, although Dr. Fabricant testified that $736,741 was the minimum amount required to produce a fair return. Silver Spur argues that the City failed to allow it to rebut this presumption, and the hearing officer and the board continued to rely on the presumption in spite of Dr. Fabricant's uncontradicted testimony. The argument is simply another rephrasing of Silver Spur's argument that the hearing officer and the board refused to correct a mathematical error, which, as discussed above, we have found to be meritless.

VII. Denial of Fair Return

Silver Spur argues that the City's actions denied it a fair return in violation of its constitutional rights. Under Galland, Silver Spur's remedy is to seek a Kavanau adjustment. (Galland, supra, 24 Cal. 4th at p. 1008.)

VIII. Motivation for City's Actions

In a form of cumulative error analysis, Silver Spur contends that the City's actions, set forth above, could not be explained as the result of "bureaucratic bumbling," but were rather the deliberate actions of sophisticated and educated professionals, and "ample circumstantial evidence in the record" shows that the City's actions were not the result of innocent errors or honest mistakes. Thus, Silver Spur argues, the City's actions collectively demonstrate that the City had an overall strategy to obstruct the rent increase application.

We reject this argument. The administrative record was voluminous. The transcripts of the various hearings reflect that the board considered the arguments of Silver Spur's counsel regarding the treatment of the debt service expense. The fact that the board disagreed with Silver Spur's position on that issue falls far short of establishing animus toward Silver Spur. Rather, the record reflects genuine disagreement about what factors should be considered in determining a fair return on investment. We find no abuse of discretion in the trial court's rejection of Silver Spur's request

for attorney fees.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ Hollenhorst
Acting P.J.

J.

We concur:

/s/ Richli
J.

/s/ Ward
J.

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FILED
NOV. 14
2004

SUPERIOR COURT OF CALIFORNIA

COUNTY OF RIVERSIDE

SILVER SPUR RESERVE, a California General Partnership, dba Silver Spur Mobile Manor,

Petitioner,

v.

THE CITY OF PALM DESERT, THE PALM, et. al.,

Respondents,

The Tenants Residing at Silver Spur Mobilehome Park, George Gutierrez, Catherine Britt, et. al.

Real Parties in Interest.

Case No. RIC 390013 (formerly INC 080790)

ORDER DENYING PETITIONER'S MOTION FOR ATTORNEY'S FEES

Hearing Date: August 18, 2003
Time: 10:30 a.m.
Dept: 35

Judge: Robert S. Drake

The motion of Petitioner, SILVER SPUR RESERVE dba SILVER SPUR MOBILE MANOR, for attorney's fees, came on regularly for hearing by the Court on August 18, 2003. Petitioner appeared by counsel, Anthony Rodriguez. Respondent appeared by counsel, Douglas S. Phillips of Best, Best & Kreiger. Real parties in interest did not appear.

The Court being fully advised in the premises, and good cause appearing therefore:

IT IS ORDERED that the motion of Petitioner, SILVER SPUR RESERVE dba SILVER SPUR MOBILE MANOR, for attorney's fees, filed June 14, 2002, is hereby denied.

Dated: 11-14, 2004

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Robert S. Drake,
Judge of the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE
Minute Order/Judgment

Case No.: 390013
Case Name: SILVER SPUR RESERVE VS CITY OF PALM DESERT
Case Category: Writ of Mandate (Mandamus)
Hearing" Court's subsequent Ruling Re: matter submitted on 8-18-03 made on 10/07/03 @ 8:00 for Department 35

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Honorable ROBERT S. DRAKE, Presiding

Clerk: M. Perez

Reporter: None

Court Subsequently Rules:

This matter came on for a hearing on August 18, 2003 in the Riverside Superior Court. The only issue was whether the conduct of the City of Palm Desert in denying Silver Spur's request for a rent increase justified an award of attorney's fees pursuant to 28 [sic] U.S.C. Section 1983.

After reviewing the pertinent documents, receiving oral argument, and reviewing the applicable law, the court now denies the Plaintiff's motion for said attorney's fees. Although many authorities were cited, the leading California case on the subject is Galland v. City of Clovis, 24 Cal. 4th 1003; 103 Cal. Rptr. 711. In that case the court observed that "The cognizable level of executive abuse of power is that which shocks the conscience. The mere finding that a government decision is arbitrary or capricious is not sufficient to establish a due process violation. Only a substantial infringement of state law prompted by person [sic] or group animus, or a deliberate flouting of the law that trammels

significant personal or property rights qualifies for federal civil rights relief under 28 [sic] U.S.C., "Section 1983". Even though the City's conduct may have been arbitrary, negligent or bureaucratic, there was no evidence presented to the court that such conduct, however distasteful, was outrageous or egregious. Thus, the standard established by Galland was met.

Notice to be given by the clerk.

Clerk's certificate of Mailing re: minute order

Notice sent to ANTHONY C. RODRIGUEZ on 10/07/03

Notice sent to BEST, BEST & KREIGER on 10/07/03